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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

COLUMBIA PICTURES
INDUSTRIES, INC., *et. al.*

Plaintiffs,

v.

GARY FUNG, *et. al.*

Defendants.

Case No. CV-06-05578 SVW (JCx)

**PLAINTIFFS' REPLY BRIEF RE
DEFENDANTS' CONTEMPT
PURSUANT TO THE COURT'S
AUGUST 7, 2013 ORDER
(ECF No. 554)**

1 The Court's August 7 Order was clear: The parties were to address whether it
 2 was feasible for Defendants to direct all Dot-Torrent files downloaded by "*foreign*
 3 *computers*" from the "Main Isohunt Site" to Defendants' own trackers in order to
 4 ensure that "American computers were not participating in the swarm" downloading
 5 process. Aug. 7, 2013 Order ("Aug. 7 Order") at 5-6 (ECF No. 554) (emphasis
 6 added). The Court expressly framed this question to track Plaintiffs' pending
 7 motion, which seeks to hold Defendants in contempt for their ongoing violation of
 8 the Injunction by inducing *foreign users* of the Main Isohunt Site to download Dot-
 9 Torrent files for Plaintiffs' copyrighted works and distribute the associated content
 10 files to U.S. users in violation of the U.S. Copyright Act. *Id.*; *see also* Pls.' August
 11 2010 Mot. for Contempt (ECF No. 454).

12 In the one sentence Defendants devote to the actual question posed by the
 13 Court, Defendants concede that "technically Defendants 'could' require users to
 14 only be directed towards Isohunt trackers." Defs.' Response Br. Re Contempt Mots.
 15 Pursuant to the Court's Aug. 7, 2013 Order, Sept. 16, 2013 ("Defs.' 9/16 Br.") at 2
 16 (lines 27-28) (ECF No. 606). That is the complete answer to the question posed by
 17 the Court. Beyond that one sentence, Defendants spend the rest of their brief
 18 attempting to confuse the issue and rearguing points this Court and the Ninth Circuit
 19 already have rejected.

20 Notably, Defendants do not – and cannot – dispute that the scope of the
 21 ongoing infringing conduct at issue is massive. As Plaintiffs' explained, with a
 22 trivial exception, all of the more than 13 million Dot-torrent files available on the
 23 Main Isohunt Site always – and only – use non-Fung Trackers which freely allow
 24 Defendants' foreign users to join in swarms with U.S. users and thereby distribute
 25 infringing content files into the United States. Pls.' Br. Re. Defs.' Contempt
 26 Pursuant to Court's Aug. 7, 2013 Order ("Pls.' 9/9 Br.") at 6-7 (ECF No. 587); Decl.
 27 of Professor Ellis Horowitz ("Opening Horowitz Decl.") ¶¶ 21-23 (ECF No. 587).
 28

1 In ordering the instant briefing, the Court stated that “[w]hether or not
 2 Defendants are in violation of the Injunction is ultimately a question of feasibility.”
 3 *See* Aug. 7 Order at 5. The briefing has confirmed that the issue of the “feasibility”
 4 of Defendants’ compliance with the Injunction is not disputed. Defendants readily
 5 could have complied with the Injunction by requiring all Dot-Torrent files on the
 6 Main Isohunt Site to use the Fung Trackers and ensuring that there were no U.S.
 7 users involved in the “swarm” process of distributing the file. Order Granting Mot.
 8 For Permanent Inj., dated May 20, 2010 (ECF No. 426), *modified* Aug. 5, 2013
 9 (ECF No. 551) (“Inj.”) ¶ 10. Alternatively, as they acknowledge, Defendants could
 10 have readily applied their “filter” to *all* downloads of Dot-Torrent files from the
 11 Main Isohunt Site – downloads by both U.S. and non-U.S. users. *See* Supp. Decl.
 12 of Gary Fung, dated September 16, 2013 ¶ 4 (ECF. No. 606-1) (“Sept. 2013 Fung
 13 Decl.”) (“Because isoHunt Lite and the Main isoHunt site use the same search back-
 14 end, search filtering works exactly the same way on each site”); *see also id.* ¶¶ 2-10;
 15 Defs.’ 9/16 Br. at 5. Indeed, as Defendants describe it, they are already using the
 16 filter on the Main Isohunt Site, but have deliberately chosen to filter only downloads
 17 by users with U.S. IP addresses. Defs.’ 9/16 Br. at 5-6.

18 Rather than providing the Court with a straightforward response to its
 19 question, Defendants resort to a game of semantics regarding which Fung website
 20 *U.S. users* currently access. Defendants assert that U.S. users no longer access the
 21 “Isohunt Lite” site as they once did, but rather now access the “Main Isohunt” Site.
 22 Defs.’ 9/16 Br. at 6. That is irrelevant for purposes of Plaintiffs’ contempt motion.
 23 As the Court knows, and clearly framed the issue to be briefed, Plaintiffs’ motion
 24 for contempt focuses on *non-U.S. users* of the Main Isohunt Site – because those
 25 foreign users violate U.S. copyright law when they distribute infringing copies of
 26 Plaintiffs’ works to U.S. users in the swarms. *E.g.*, Aug. 7 Order at 4-6.

27 Defendants appear to be trying to create confusion by arguing that
 28 “Defendants have been filtering Plaintiffs’ titles from *U.S. users* on the Main

1 isoHunt Site to comply with the Injunction since 2010.” Defs.’ 9/16 Br. at 1
 2 (original emphasis modified). Defendants make this argument to suggest that they
 3 are complying with the Injunction by filtering on the Main Isohunt Site. Defs.’ 9/16
 4 Br. at 1, 9. That, however, is false. To be clear: Defendants admit that they are
 5 applying the filtering on the Main Isohunt Site *only* for U.S. users and *not for non-*
 6 *U.S. users*. That fact is undisputed. Defs.’ 9/16 Br. at 1, 4-6, 9-11, 15 (filtering is
 7 only applied for U.S. users). When a user with a U.S. IP address accesses the Main
 8 Isohunt Site, Defendants apply the copyright filter (and otherwise limit the inducing
 9 features of the site that the U.S. user sees). However, when a user with a non-U.S.
 10 IP address accesses the Main Isohunt Site – *i.e.*, the users at issue in Plaintiffs’
 11 contempt motion – Defendants do not apply any filter and continue to actively
 12 induce those non-U.S. users to infringe Plaintiffs’ copyrighted works through the
 13 same features that the Court identified in its liability decision. Supp. Decl. of Ellis
 14 Horowitz, dated Sept. 23, 2013 (“Supp. Horowitz Decl.”) ¶¶ 8-15 (confirming that
 15 Defendants apply no filtering to search results for foreign users of the Main Isohunt
 16 Site); *see also* Pls.’ 9/9 Br. at 3-4, 8.

17 ARGUMENT

18 **I. Defendants Have Conceded Technical Feasibility.**

19 With their September 9 brief, Plaintiffs submitted a detailed declaration from
 20 Professor Ellis Horowitz outlining the simple steps Defendants could take to comply
 21 with the Injunction. Defendants would need to: (i) insert the addresses for the Fung
 22 Trackers into the Dot-Torrent files and remove all other tracker addresses; and (ii)
 23 “register” the Dot-Torrent files with the Fung Trackers. Opening Horowitz Decl.
 24 ¶¶ 20-22. Professor Horowitz testified that this would take Defendants less than one
 25 day’s worth of programming time. *Id.*; *see also* Pls.’ 9/9 Br. at 2, 9-11.

26 Defendants have not refuted Professor Horowitz’s testimony. Rather,
 27 Defendants’ sole rejoinder consists of the unsubstantiated assertion in their brief
 28

1 (not even in the supporting Fung Declaration) that they “cannot control” what
2 happens on the third party trackers listed in Dot-Torrent files. Defs.’ 9/16 Br. at 2,
3 10-11. However, Defendants can control the tracker addresses that are inserted into
4 Dot-Torrent files downloaded from the Main Isohunt Site and, in fact, they already
5 do so, as described at length in Professor Horowitz’s declaration. *See* Opening
6 Horowitz Decl. ¶¶ 12, 15-19. As such, Defendants’ refusal to use the Fung
7 Trackers in this manner has nothing to do with technical feasibility. *Id.*

8 Nor can Defendants avoid a finding of contempt based on the unsubstantiated
9 assertion that Plaintiffs’ seek redress for “hypothetical conduct.” Defs.’ 9/16 Br. at
10 10-11. The unrebutted record evidence establishes that: (i) virtually all of the more
11 than 13 million Dot-Torrent files indexed on the Main Isohunt Site use *non-Fung*
12 *Trackers*; and (ii) because of that, for all Main Isohunt Dot-Torrent files, there are
13 U.S. users in the swarms such that Defendants’ foreign users distribute infringing
14 files into the U.S. *See* Pls.’ 9/9 Br. at 6-8; Decl. of Thomas Sehested in Supp. of
15 Pls.’ Mot. for Contempt, dated Aug. 2, 2010 ¶ 10 (ECF No. 454-12); Opening
16 Horowitz Decl. ¶ 14. Defendants themselves acknowledge massive ongoing
17 infringement: they claim to have filtered over 3 million Dot-Torrent files
18 corresponding to Plaintiffs’ works – but Defendants only filter them for users
19 downloading the Dot-Torrent from *a U.S. IP address*. *See* Sept. 2013 Fung Decl.
20 ¶¶ 6, 10. Defendants do not filter any these same Dot-Torrent Files for foreign users
21 of the Main Isohunt Site. Thus, Defendants continue to induce their foreign users of
22 the Main Isohunt Site – the users at issue in this contempt motion – to download
23 millions of Dot-Torrent files for Plaintiffs’ copyrighted works and distribute
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1 infringing copies of the content files into the United States. *See* Opening Horowitz
 2 Decl. ¶ 19; Supp. Horowitz Decl. ¶¶ 20-21. That harm is anything but hypothetical.¹

3 **II. Defendants Are Not Filtering Plaintiffs' Copyrighted Works For** 4 **Foreign Users Of The Main Isohunt Site.**

5 In their brief, Defendants seek to deflect attention from their contempt of the
 6 Injunction by describing their keyword filtering of Plaintiffs' copyrighted works for
 7 *U.S. users* who access the Main Isohunt Site. However, this is irrelevant to
 8 Plaintiffs' contempt motion, which concerns the non-U.S. users of the Main Isohunt
 9 Site (who systematically distribute infringing files to U.S. users).

10 As described in the Supplemental Horowitz Declaration, Defendants detect
 11 the IP address of the users who access the Main Isohunt Site. If the user is located
 12 in the U.S., Defendants apply their keyword filter for any search results and display
 13 a modified user interface. Supp. Horowitz Decl. ¶¶ 8-15, 20-21. If the user is
 14 located outside the U.S., Defendants do not apply any filtering and the user interface
 15 has remained materially the same since the inception of the case (meaning the user
 16 sees the inducing features identified by the Court in its liability decision). *Id.*; *see*
 17 *also* Pls.' 9/9 Br. at 3-4, 8. Defendants do not dispute any of these facts. *See, e.g.,*
 18 *Defs.' 9/16 Br. at 13* (distinguishing the "non-US version of Isohunt" accessible by
 19 foreign users from the "filtered version" accessible in the U.S.).

20 As this Court noted in its August 7 Order, the present Motion only addresses
 21 Defendants' violation of the Injunction when they induce *foreign users* of the Main
 22 Isohunt Site to distribute infringing content files into the U.S. *See* Aug. 7 Order at

23
 24 ¹ Defendants' claim that certain titles are blocked globally because of alleged
 25 "DMCA notice and takedown procedures," *Defs.' 9/16 Br. at 1*, is irrelevant to any
 26 issue before the Court. There is no indication that those are Plaintiffs' titles and, at
 27 any rate, this has no bearing on Defendants' failure to comply with the Injunction.
 28 For purposes of the Injunction, Plaintiffs do not identify their works through DMCA
 notices, but rather pursuant to the express terms of the Injunction. *Inj. ¶ 5.*

1 4. With respect to these foreign users, there is no dispute that Defendants do not
 2 apply any copyright filter for Plaintiffs' copyrighted works. Nor is there any dispute
 3 that when foreign users visit the Main Isohunt Site, Defendants continue to engage
 4 in all the same infringement inducing conduct described in the Court's liability
 5 decision. Supp. Horowitz Decl. ¶¶ 20-21; *see also* Pls.' 9/9 Br. at 3, 8, 12; Pls.' Br.
 6 in Supp. of Aug. 2010 Mot. for Contempt at 3-4 (ECF No. 454). Thus, every
 7 foreign user of Defendants' Main Isohunt Site can freely download millions of Dot-
 8 Torrent files for Plaintiffs' copyrighted works and distribute the associated content
 9 files into the U.S. This plainly violates Paragraph 10 of the Injunction.

10 **III. Defendants Continue To Mischaracterize Plaintiffs' Motion For** 11 **Contempt.**

12 Unable to dispute the record evidence, Defendants rehash the same legal
 13 arguments considered and rejected by the Ninth Circuit and this Court, *i.e.*, that the
 14 Injunction cannot apply to the downloading of Dot-Torrent files by non-U.S. users
 15 of the Main Isohunt Site. Defs.' 9/16 Br. at 10-11. However, the Ninth Circuit
 16 rejected Defendants' arguments as "wrong as a matter of fact." *Columbia Pictures*
 17 *Industries, Inc. v. Fung*, 710 F.3d 1020, 1047 n.22 (9th Cir. 2013). Since Paragraph
 18 10 of the Injunction applies only if there is a U.S. user in the swarm, the Court held
 19 that "[t]he injunction explicitly applies only to acts of infringement 'that take place
 20 in the United States.'" *Id.*

21 As discussed in Plaintiffs' July 2013 Reply, the "blocking" of U.S. users from
 22 accessing the Main Isohunt Site merely addresses one aspect of the infringing
 23 conduct enjoined by this Court, *i.e.*, Defendants' inducement of infringing
 24 downloads (*i.e.*, *reproductions*) of content files by U.S. users who access
 25 Defendants' sites directly. Pls.' July 2013 Reply Brief Re Contempt Motions ("July
 26 2013 Reply) at 3, 5-6 (ECF No. 549). The Injunction, however, also enjoins
 27 Defendants from inducing their non-U.S. users from *distributing* infringing content
 28 files to U.S. participants in the swarm (regardless of whether those U.S. swarm

members have themselves directly accessed the Main Isohunt Site). Defendants simply ignore that Defendants' foreign users of the Main Isohunt Site violate U.S. copyright law every time they distribute infringing copies of Plaintiffs' works into the United States to U.S. users. *See* Pls.' Mot. for Permanent Injunction at 14 (ECF No. 395); Pls.' Supp. Mem. In Support of Mot. for Permanent Injunction at 4-6 (ECF No. 423); July 2013 Reply at 5-6 (collecting cases).

Given the above, Defendants’ contention that Plaintiffs seek to hold them in contempt for the conduct of “third parties” who are not users of their websites, Defs.’ 9/16 Br. at 7, is simply inaccurate as a factual matter. Plaintiffs do not seek to hold Defendants in contempt for the conduct of the U.S. users in the swarms, but rather for the conduct of Defendants’ own users of the Main Isohunt Site who distribute Plaintiffs’ copyrighted works to those U.S. users in violation of U.S. copyright law. Defendants were found liable by this Court for inducing their *own users* to infringe Plaintiffs’ copyrighted works. *See Columbia Pictures Indus., Inc. v. Fung*, No. CV-06-05578 SVW (JCx), 2009 WL 6355911, at *11 (C.D. Cal. Dec. 21, 2009), *aff’d* 710 F.3d 1020 (9th Cir. 2013). This motion addresses Defendants’ exact same infringing conduct, *i.e.*, Defendants’ inducement of *their own non-U.S. users* of the Main Isohunt Site to infringe U.S. copyright law.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for contempt should be granted.

1 Dated: September 23, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2013, copies of the following documents were sent electronically to the attorneys listed below: (i) Plaintiffs' Reply Brief Re Defendants' Contempt Pursuant to the Court's August 7, 2013 Order (ECF No. 554); and (ii) the accompanying Supplemental Declaration of Ellis Horowitz, and all exhibits thereto.

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